Supreme Court, U.S.
FILED
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW J. SMITH,
Petitioner

v.

STATE OF GEORGIA,
Respondent.

On Petition For Writ Of Certiorari
To the Georgia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MATTHEW J. SMITH
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QUESTIONS PRESENTED FOR REVIEW

The Petitioner was the Defendant in a jury trial that resulted in a hung jury. The court then read an *Allen* charge to the jury and instructed the jury that their verdict must be unanimous and shortly thereafter, the jury returned a guilty verdict.

Did the Georgia Court of Appeals err in failing to reverse the conviction of the Petitioner in light of the fact that the jury reported they were deadlocked after many hours of deliberations and only after the court read the *Allen* charge to them was a guilty verdict rendered?

Was the jury's instruction in this case impermissibly coercive and in violation of Georgia law and the Defendant's 5th and 14th amendment rights to procedural due process and his 6th amendment right to a fair trial?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are named below.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix_____ to the petition and is

[ ] reported at_____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _B_ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the __Georgia Appealant__ court appears at Appendix___A_ to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

I. STATEMENT OF THE CASE AND FACTS

In the early morning hours on June 4, 2005, Matthew Smith left a friend's house after falling asleep on the couch (T- 143). While trying to get home, at approximately 2:20 am, he was pulled over by Trooper Michael J. Brown, for touching the center lanes, while traveling East on Peachtree Street (T-52, 53). After giving his drivers license and proof of insurance to the officer, Trooper Brown asked him if he had anything to drink (T-148). Matthew then told the officer that he had not been drinking but was coming from a friend's place (T-148). The Trooper then asked Matthew to step out of his vehicle, because he smelled alcohol (T-26). Trooper Brown then began questioning Matthew about why his eyes were watery, specifically if he was wearing contacts (T-27). Without any warning, Trooper began immediately administering a Horizontal Gaze Nystagmus ("HGN"), by waving a pen in front Matthew's face (T-28, 154). Matthew,

not knowing that the Trooper was administering the HGN and that the test required him to hold his head still to ensure scoring of the test was not compromised, moved his head with the pen until partway through the test the Trooper asked him to stop moving his head (T- 38, 154). After the HGN was complete, Trooper Brown then asked Matthew to perform two other Field Sobriety Tests ("FSTs"), the nine-step walk and turn and the one legged stand (T-154). While the officer was looking for suitable, level ground to perform the tests, (T-156), Matthew refused to perform the tests, letting the Trooper know that because he was tired, and overweight he did not believe that he would be able to complete the tests (T-155). Based on the Trooper's observations, (an odor of alcohol, red eyes, slurred speech, and failing the HGN), Matthew was then placed under arrest for DUI and failure to maintain a lane (T-39, 40). The Trooper then read Matthew the implied consent warning and asked him to take a breath test (T- 33). Because he was an

engineer and questioned the accuracy of a machine that, to his knowledge might not be calibrated correctly, Matthew refused to take the breath test (T-158).

The appellant Matthew Smith was represented by retained counsel in a jury trial that took place May 22 through 24, 2006 before Judge Myra Dixon (T-1). The trial court erred in denying appellant's objection to the giving of the *Allen* charge to the jury as it was unduly suggestive and illegally and unconstitutionally influenced those with the minority opinion to change their minds in order to come to agreement with the jurors with the majority opinion (T-276-277).

Giving the *Allen* charge over appellant's objection was impermissibly coercive and in violation of appellant's Fifth, Sixth and Fourteenth Amendment rights guaranteeing him a fair trial and a right to procedural due process in light of the surrounding circumstances.

1. The jury had only been deliberating for approximately four hours before reporting that they were unable to come to a unanimous verdict on the DUI charge (T-274),

2. The jury had bypassed lunch to try to come to a decision (T-275), and

3. The jury only deliberated for approximately one and a half hours before returning a verdict (T-277) and after the court *Allen* charged them and told them their verdict must be unanimous.

After the jury had been deliberating for approximately four hours, the court decided that an *Allen* charge should be read to the jury after a note was sent out stating that they were unable to reach a decision on the DUI charge (T-274,274). Appellant's counsel objected to the *Allen* charge noting that the jury had not eaten (T-274, 275).The trial court decided, based on the jury note, to read the jury the *Allen* charge despite the fact that the jury had only been deliberating for a short amount of time (T-277). The court

noted that their verdict must be unanimous. After the *Allen* charge, the jury again sent out a question about what defined a DUI and if .06 could be considered a DUI (T-278,279). The court again charged the jury with the definition of DUI but told the jury that .06 was not relevant to this case because there was no testimony regarding the BAC of the Appellant (T-293,294). The jury then deliberated for a short amount of time and returned a verdict with approximately one and a half hours of further deliberations after the *Allen* charge had been read (T-295).

The *Allen* charge given by the court was impermissibly coercive to the jury because the jury did not spend an adequate amount of time deliberating after the charge was read. The Supreme Court of Georgia held in Burchette v. State, that an *Allen* charge may be impermissibly coercive if the "instruction is so coercive as to cause a juror to abandon an honest conviction for reasons other than those base upon the trial or the arguments of other jurors". 278 Ga. 1, 3 (2004).

Although that case specifically focused on the language "must be decided", the court held that a factor in determining whether the charge was impermissibly coercive was the amount of time that the jury deliberated before and after the charge was read. Id. In Burchette, the court held that the charge although inaccurate was not impermissibly coercive because the jury deliberated the same amount of time before the *Allen* charge was read as they did after the charge was read. Id.

The Court of Appeals of Georgia held in Scott v. State, that a jury deliberating for only one hour was sufficient and that a deficient *Allen* charge was therefore not coercive. 281 Ga.App. 106, 111 (2006). This court held that because the trial was "short, lasting only one day, and there were few witness that the one hour deliberations after the *Allen* charge was sufficient time. Id. This court held also in Graham v. State, that because the jury had been read the *Allen* charge in the morning after they had taken the night

away from deliberations, they were "presumably refreshed" and therefore one hour of deliberations after the charge was read was insufficient to render the *Allen* charge impermissibly coercive. 273 Ga.App. 187, 191-192 (2005).

Unlike the trial in Scott, this trial lasted two days, with four witnesses (T-2). Two of the witnesses (Trooper Brown and Tony Corrota), spent a significant amount of time discussing the correct procedures for conducting a valid HGN (T-22-T-137). The jury spent four hours deliberating without deciding on the DUI charge, yet after the *Allen* charge spent only an hour and a half in deliberations (T-274, 277). Furthermore, unlike the jury in Graham, who had a break the night before the *Allen* charge was read and then was presumably refreshed, this jury had skipped lunch, and had been in court all day. 273 Ga.App. at 191; (T-275). This distinguishes Matthew's case from the harmless error in Burchette and establishes that the *Allen* charge bullied a tired and hungry jury into a hasty verdict so that they would not have to come back for another day of

deliberations. This issue is preserved for appeal (T-274), and this claim must pass a "harmless error test" under Burchette v. State, supra.

The jury returned a verdict of guilty to the charge of failure to maintain a lane and DUI (T- 295) only after the *Allen* charge was read to them.

On July 5, 2006, a Motion for New Trial was filed within the time required by Georgia law. The motion for new trial was denied by the trial court on December 21, 2006 and within 30 days of a notice of appeal was filed on January 18, 2007. The Court of Appeals affirmed the lower court decision on June 5, 2007. The Georgia Supreme Court denied certiorari on September 10, 2007.

REASON THAT CERTIORARI SHOULD BE GRANTED

The Defendant has been deprived of his right to due process and his right to a fair trial because of the coercive jury instruction allowed by the trial court in this case. This case serves as a prime example as the reason that *Allen* charges should be totally prohibited in all criminal cases in this country and in fact, same is the trend across this county. The United States Supreme Court should end the use of coercive language to a jury from the bench order to bully a verdict of guilty out of a deadlocked jury. The interest of the public and the American justice system is damaged with such court conduct. American citizens are being deprived of their 5th, 6th, and 14th Constitutional Amendment rights. The United States Supreme Court has a duty to restore fairness to the lower courts and review their behavior when such a flagrant violation of constitutional law exists as in the present case.

FIRST DIVISION

Andrews, P.J. Ellington and Adams, J.J.

IN THE COURT OF APPEALS OF GEORGIA
AO7A1347.SMITH v. THE STATE
ANDREWS, PRESIDING JUDGE

Matthew Smith appeals from his conviction of driving under the influence of alcohol (DUI) and failure to maintain lanes on the grounds that the trial court erred when it delivered an *Allen* charge to the jury and when it denied his motion to exclude the results of a horizontal gaze nystagmus (HGN). We find no error and affirm.

Viewed in the light most favorable to the jury's verdict, the record shows that in the early morning of June 4, 2005, a state trooper patrolling Peachtree Road in Atlanta saw Smith's car weave and then cross the double yellow lines twice. The trooper activated his blue lights and pulled Smith's car over. As the trooper asked for Smith's license, he smelled alcohol and noticed that Smith's eyes were red and watery. When Smith denied that he had been drinking, the trooper asked him to get

out of his car. When Smith did so, the trooper noticed that Smith steadied himself on the doorframe before moving to the back of the car and that his speech was slurred. The trooper then administered an HGN test, which Smith failed by a maximum score of six clues for DUI. The trooper then asked Smith for a breath test, to stand on one leg, and to walk nine steps in turn. Complaining that he was tired, Smith refused to perform any of the tests. The trooper then put Smith under arrest for DUI and failure to maintain lanes. After his indictment, Smith filed a motion in limine concerning the HGN test. The trial court denied the motion. Smith's motion for a new trial was likewise denied.

1. Smith asserts that the trial court erred in admitting the trooper's testimony about the HGN test because he was not qualified to administer it and because the test was not properly administered. We disagree. Because the trial court sits as the trier of fact when ruling on a motion to suppress or a motion in limine, if findings are based upon conflicting evidence

or analogous to a jury verdict and should not be disturbed by a reviewing court if there is any evidence to support them. *Monas v. State*, *See*, 70 Ga. App. 50, 52 (2) (606 S.E.2d 80) (2004). When we review a trial court's decision on such motions to exclude evidence, we construe the evidence most favorably to uphold the findings and judgment, and we adopt the trial court's finding on disputed facts and credibility unless they are clearly erroneous. *Id.*

In ruling on whether an HGN test was administered properly under law enforcement guidelines, courts have considered whether the arresting officer was sufficiently trained to give the test, whether the officer was experienced in administering the test, whether the officer administered the test according to the standardized techniques, and whether the officer scored or interpreted the test properly.

State v. Tousley, 271 Ga. App. 874, 879 - 880 (1)(b)(ii) 611 S.E.2d 139 (2005). Here the trooper testified that he had been certified to perform field sobriety tests, including the HGN test,

since 1994 and that he had made approximately 20 DUI arrests a year during his 12 years as a state trooper. The trooper also testified that he had administered the tests correctly. Smith's expert witness attacked the trooper's qualifications as well as his methods in administering the tests. Since all the questions thus raised were for the jury, the evidence supports the trial court's denial of Smith's motion in limine. *Id.* at 879 - 882(1)(b)(ii) and *see*, (2) vacating grant of motion in limine concerning HGN tests where the state laid proper foundation concerning officer's qualifications and methods; questions of that officer's proper administration of tests were for the jury.

2. The evidence outlined above, including the results of the HGN test was sufficient to support he jury's verdict. *See*, O.C.G.A. § 40-6-391(a)(1), 40-6-48(1); *Kuchne v. State*, 274 Ga. App. 668, 668 - 669(1) 618 S.E.2d 702 (2005). (Evidence was sufficient to support convictions for less-safe DUIs and failure to maintain lanes.)

3. Smith also asserts that the trial court erred when it delivered an *Allen* charge after the jury had indicated that it was deadlocked. Specifically, Smith argued that (a) the charge was coercive in light of the circumstances, and (b) the charge itself was improper. Again, we disagree.

The record shows that after deliberating for approximately four hours on the morning of the third and last day of the trial, the jury reported it could not reach a verdict. The trial court recalled the jury and delivered a pattern (*Allen* charge). At the conclusion of the charge, Smith's counsel asked the trial court to offer the jury a break for lunch. The trial court told the jury that they could retire and "decide if you are hungry... you can think about it and let me know whatever you want to do - or some juice or some cookies, candy, whatever you want." The jury then returned to deliberations, asked for and received further instruction on the definition of DUI, and reached its verdict soon afterwards. The trial court then polled the jury and each member confirmed that verdict.

a. We cannot conclude for the record before us that the trial court withheld refreshment from the jury or that it abused its discretion when it delivered an *Allen* charge under these circumstances. *See*, *Scott v. State*, 281 Ga. App. 106, 111 - 112(3)6) 835 S.E.2d 582, 206 (No error in delivering the *Allen* charge after three hours of deliberation and where a jury would return its verdict after an hour and a half.).

b. The *Allen* charge here did not contain the now disapproved admonition that the case "must be decided by some jury." *See*, *Burchette v. State*, 278 Ga. 1, 3 (596 S.E.2d 162) (2004). Instead, it found a new pattern *Allen* charge, including that " the court deems it proper to advise you (further) in regard to the desirability of agreement if possible." See Council of Superior Court Judges Suggested Pattern Jury Instructions, 3rd edition, Vol.2, pp. 46-47 (2003). There was no error here.

SUPREME COURT OF THE STATE OF GEORGIA
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Date: September 10, 2007

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Case No.: SO7C1528

Matthew J. Smith v. The State

Court of Appeals No.: AO7A1347

The Supreme Court today denied the petition for certiorari in this case. All the justices concur.

Therese S. Barnes, Clerk